

**OFFICE OF HEARINGS AND APPEALS  
WEEKLY REPORT**

**March 13, 2009**

**Decisions Issued:**

**Personnel Security (10 CFR Part 710)**

On March 6, 2009, an OHA Hearing Officer issued a decision in which she concluded that an individual's suspended DOE access authorization should be restored. A DOE Operations Office suspended the individual's security clearance citing a diagnosis of a DOE psychiatrist that the individual met the criteria for alcohol dependence, as a security concern. After conducting a hearing and evaluating the documentary and testimonial evidence, the Hearing Officer found that the individual presented sufficient evidence to fully resolve the security concern raised by his past alcohol use. In making her determination, the Hearing Officer relied on the testimony of the individual and his witnesses that he had been abstinent from alcohol for approximately ten months, completed both an inpatient treatment and intensive outpatient treatment programs, attended weekly aftercare counseling sessions, and attended several Alcoholics Anonymous meetings each week. Based on these factors, the Hearing Officer agreed with the opinion of the DOE psychiatrist that the individual presented evidence establishing adequate rehabilitation and reformation from his alcohol dependence. OHA Case No. TSO-0683 (Diane DeMoura, H.O.)

On March 9, 2009, an OHA Hearing Officer issued a decision in which he concluded that an individual should be granted an access authorization. During its investigation of the individual, the DOE learned that he had attempted suicide and had been treated for depression. A DOE psychiatrist subsequently evaluated the individual and concluded that he suffered from a mental or emotional condition that caused, or could cause, a defect in his judgment or reliability, with inadequate evidence of reformation or rehabilitation. After conducting a hearing and evaluating the documentary and testimonial evidence, the Hearing Officer concluded that the security concerns regarding the individual were sufficiently mitigated. In reaching this conclusion, the Hearing Officer considered the testimony of the DOE psychiatrist and the individual's psychiatrist, both of whom concluded that, as of the date of the hearing, the individual was exhibiting adequate evidence of reformation and rehabilitation, and the fact that the individual had not experienced a depressive episode for six years. OHA Case No. TSO-0672 (Robert B. Palmer, H.O.)

On March 9, 2009, an OHA Hearing Officer issued a Decision in which he concluded that an individual's DOE access authorization should not be restored. A DOE Operations Office referred the individual's request for a security clearance to administrative review citing the individual's past use of marijuana, his failure to list the marijuana use on two DOE security questionnaires, and his association with users of marijuana as security concerns. After conducting a hearing and evaluating the documentary and testimonial evidence, the Hearing Officer found that the individual presented sufficient evidence to fully resolve the concern raised by his past marijuana use, based on: (1) the infrequency of the individual's use, (2) his age at the time of use, (3) the passage of time since, and (4) the individual's stated intent

to completely abstain from using illegal drugs in the future and to not associate with those who do so. The Hearing Officer also found the concern related to his association with users of illegal drugs to be resolved, noting that the individual had not understood association to include being in the presence of individuals who are users of illegal drugs, even if those individuals are not in the possession of such drugs. However, the Hearing Officer determined that there was insufficient information in the record to adequately mitigate the concern raised by the individual's falsification of two DOE security questionnaires. The individual admitted in a Personnel Security Interview that he had not provided truthful answers on the questionnaires, but at the hearing claimed that he had. The individual offered no credible evidence that would explain the contradictions in his various accounts of his past marijuana use. OHA Case No. TSO-0687 (Steven J. Goering, H.O.)

On March 11, 2009, an OHA Hearing Officer issued a decision finding that DOE should not restore an individual's access authorization. A local security office (LSO) suspended the individual's access authorization due to three security concerns: (i) a DOE psychiatrist diagnosed him with alcohol dependence; (ii) alcohol dependence is an illness that may cause a significant defect in judgment and reliability; and (iii) he signed three DOE Security Acknowledgments, stating that he understood that if a psychiatrist diagnosed him with alcohol dependence, he may lose his access authorization. The individual attempted to resolve all three security concerns by arguing that he has reformed and rehabilitated himself from his alcohol dependence. The Hearing Officer found that the individual maintained a year of sobriety, obtained professional treatment, and participated in Alcoholics Anonymous. However, given the individual's long drinking history, the Hearing Officer found that the individual's risk of relapse is too high to resolve the security concerns. The individual's previous relapse, coming after dramatic consequences from previous relapses, suggested that to lower his risk of relapse, the individual must remain sober longer than he has previously. His single year of sobriety fell far short of his longest period of sobriety, two years and three months. OHA Case No. TSO-0685 (David M. Petrush, H.O.)

### **Appeal**

On March 9, 2009, the OHA issued a decision denying an Appeal filed by Battelle Energy Alliance (BEA) of an Initial Agency Decision (IAD) issued by an OHA Hearing Officer in connection with a whistleblower complaint filed by Dennis D. Patterson (Patterson) against BEA, under the DOE Contractor Employee Protection Program, 10 CFR Part 708. In the IAD, the Hearing Officer determined that Patterson was entitled to relief under Part 708 based upon findings that Patterson had engaged in protected activity that was a contributing factor in adverse personnel actions taken against him by BEA, and that BEA had failed to show by clear and convincing evidence that it would have taken the same actions against Patterson in the absence of his protected activity. *Dennis Patterson*, Case No. TBH-0047 (June 20, 2008). In its Appeal, BEA contended that an investigation it initiated against Patterson, even if initiated for a retaliatory purpose, cannot constitute a Part 708 "retaliation." The Appeal decision rejected this contention as inconsistent with the Part 708 definition of "retaliation," the Part 708 preamble, and OHA precedent. BEA also contended that it had presented clear and convincing evidence that it would have taken the same actions in the absence of the protected activity. The Appeal rejected this contention, on the ground that the BEA had not demonstrated that the Hearing Officer erred in her conclusions. OHA Case No. TBA-0047